

1 John L. Cooper (State Bar No. 050324)
jcooper@fbm.com
2 Farella Braun + Martel LLP
235 Montgomery Street, 17th Floor
3 San Francisco, CA 94104
Telephone: (415) 954-4400
4 Facsimile: (415) 954-4480

5 Attorneys for Rule 706 Expert, James R. Kearl
6
7

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION
11

12 ORACLE AMERICA, INC.,

13 Plaintiff,

14 vs.

15 GOOGLE, INC.,

16 Defendant.
17

Case No. C 10-3561 WHA

DECLARATION OF DR. JAMES R. KEARL
IN RESPONSE TO ORACLE'S MOTION TO
DISQUALIFY HIM FROM SERVING AS A
RULE 706 EXPERT

18 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

19 By Orders dated August 30, 2011 (Doc #374) and September 9, 2011 (Doc # 413) I was
20 appointed by this Court pursuant to Rule 706 of the Federal Rules of Evidence to serve as an
21 independent expert on the issue of damages claimed by plaintiff Oracle America in the present
22 action. My biographical information and credentials are set forth in my expert report dated
23 March 21, 2012 which has been previously served on the parties.

24 By motion dated October 20, 2015 (Doc #1347) Oracle moved to disqualify me from
25 serving as the Court Appointed Rule 706 Expert.

26 I do not believe it appropriate for me to oppose Oracle's motion to disqualify me as a Rule
27 706 expert in this matter in that I do not have an adversarial position vis-a-vis Oracle or Google.
28 I serve as a Court Appointed Rule 706 expert at the pleasure of and for the benefit of the Court.

1 As such, I also do not believe it appropriate for me to argue to this Court that it should continue to
 2 retain me in this matter. However, I do believe it is appropriate for me to make certain that the
 3 Court has an accurate presentation of the facts and to point out that my conduct in *Apple v.*
 4 *Samsung*, Case No. 12-cv-00630-LHK pending before Judge Koh in the Northern District of
 5 California does not constitute a conflict of interest here.

6 In this regard, I want the record to reflect the following facts:

- 7 1. I was retained by Samsung Electronics Co. Ltd to serve as an economic expert witness in
 8 *Apple v. Samsung*.
- 9 2. My engagement was as an expert economist solely to value specific features of Apple
 10 products (including but not limited to the iPhone and iPad) that were alleged to infringe
 11 certain Samsung patents, and to evaluate licensing and FRAND claims related to specific
 12 Samsung standard essential patents which certain Apple devices were alleged to have
 13 infringed. I was not asked, nor did I undertake, to do anything beyond this.
- 14 3. While Apple did assert certain patent infringement claims against Samsung products
 15 (including Samsung phones that utilized the Android operating system), my assignment
 16 did not involve those claims or products. (Other damages experts were retained by
 17 Samsung for the “defensive” part of its case and I had no communication or contact with
 18 these experts during the entirety of my work in the matter.)
- 19 4. This engagement was a very expensive and time consuming undertaking. I did not spend
 20 time reviewing or discussing anything with Samsung’s attorneys or anyone else regarding
 21 any matters beyond my narrowly focused assignment.
- 22 5. I was not retained by Google, did not side with Google, and my analysis and opinions
 23 were not about Google, Google products or Android. My work and analysis related solely
 24 to the value of certain features on Apple products.
- 25 6. I was not retained to defend Android, and did not defend Android in my analysis and
 26 opinions.
- 27 7. Whatever were the larger issues in the case, and however these issues may have been
 28

1 correctly or incorrectly characterized by Apple or Samsung to the jury, my analysis and
2 opinions were in no way concerned with nor about Apple versus Google.

- 3
4 8. As an engaged economic expert, I was paid by Samsung for my work at an agreed upon
5 hourly rate. Neither I, nor the consulting firm with which I worked, was paid \$5 million,
6 or anything close to this amount. Whatever the basis for the Apple statement or any other
7 statement regarding Samsung experts being paid \$5 million is beyond my knowledge and
8 is not accurate with reference to me.
- 9 9. In *Apple v Samsung* I valued the asserted Samsung patents consistent with Federal Circuit
10 guidelines and law. While it is correct that the amount of damages that Samsung sought at
11 trial was on the order of \$6 million, I did not intentionally lower my damages estimates. I
12 offered a well-supported and reasonable estimate of the reasonable royalties in light of the
13 objective evidence of the value of the accused features and the availability of non-
14 infringing substitutes. As is clear from review of my expert report in *Apple v Samsung*,
15 the original reasonable royalty numbers in my opinion are many times higher than the
16 amount presented at trial. The reduction in the royalty amounts presented at trial was the
17 result of certain patents, claims, and products being dropped from the case, in part due to
18 case narrowing orders from that Court.
- 19 10. I was not asked about, nor did I participate in, any discussions with regard to which
20 patents or claims to assert in *Apple v. Samsung* or which products to accuse. I was not
21 privy to how these decisions were made, and was I not consulted or asked to give an
22 opinion or to make suggestions as to which patents or claims to assert or products to
23 accuse.
- 24 11. I was not an advocate for Samsung or for Samsung's products, nor was I a critic of Apple
25 or Apple's products. My task was to value certain designated functionalities and to derive
26 a reasonable royalty as to those features which had been selected for consideration by
27 someone else. I assumed, as a damages expert must, that the asserted Samsung patents
28 were valid and infringed by Apple, but I had no opinion and expressed no opinion on

1 whether these assumptions were true.

- 2 12. I did not meet or speak with any Samsung corporate officer or employee at any time
3 before, during or after the *Apple v. Samsung* trial, with the single exception that a
4 Samsung in-house attorney was intermittently present during portions of my preparation
5 that occurred over parts of three days leading up to my court testimony that lasted no more
6 than 20 minutes. My communication and work was with counsel from the Quinn
7 Emanuel law firm, which was the outside law firm for Samsung. Likewise, whatever the
8 relationship between Google and Samsung, I had no communication before, during or
9 after the trial with any Google corporate officer or employee. Google's role, if any, and its
10 products and services were completely irrelevant to the work that I did. I was not
11 provided with information regarding Google's role in *Apple v. Samsung*, nor did I inquire
12 about such.
- 13 13. I have no opinion or position, private or otherwise, and have expressed no opinion on the
14 liability issues in the *Oracle v. Google* and nothing that has occurred since I filed my Rule
15 706 expert report in this matter has influenced me with regard to the issues in the pending
16 litigation.
- 17 14. I have worked extensively for both plaintiffs and defendants in intellectual property
18 damages matters and other matters as well. In my experience this is common for expert
19 economists. I address each assignment based on the merits of the particular claims and do
20 not form an allegiance to a client firm (either the ultimate client such as Samsung or their
21 outside counsel such as Quinn Emanuel). It is not uncommon for expert economic
22 witnesses to be retained by a firm and later be adverse to the same firm on a different
23 issue (again, either the ultimate client firm or the law firm). This is a recognition of the
24 independence and professionalism of economic experts and not an indication of bias.
- 25 15. I am confident that I can assist the court as a neutral economic expert in the present action
26 and I am prepared to do so if the Court wishes.
- 27 16. I am amenable to the court utilizing my services in any manner in which it sees fit,
28

1 including having me testify before the jury, having me testify to the Court outside of the
2 presence of the jury to assist the court in determining how to proceed with my
3 presentation or to assist the Court in directing questions to the expert witnesses of the
4 parties before the jury.

5 17. I will be present at the hearing of this matter on November 19, 2015 and will be prepared
6 to respond further as requested at that time.

7 Dated: October 28, 2015

8
9
10 By: /s/ James R. Kearl
Dr. James R. Kearl

11
12 **ATTESTATION OF CONCURRENCE**

13 I, John L. Cooper, the ECF User whose ID and password are being used to file this
14 Declaration of Dr. James R. Kearl, hereby attest that Dr. James R. Kearl has concurred in this
15 filing.

16 Date: October 28, 2015

17
18
19
20
21
22
23
24
25
26
27
28
/s/ John L. Cooper
John L. Cooper